

April 12, 2000

VIA HAND DELIVERY

Mr. Michael Spates
Manager
Delivery
U.S. Postal Service
475 L'Enfant Plaza SW
Room 7142
Washington, DC 20260-2802

Re: Delivery of Mail to a Commercial Mail Receiving Agency

Dear Mr. Spates:

By way of introduction, the Office of Advocacy is an independent office within the Small Business Administration. It was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. The Office of Advocacy has been actively involved in representing the concerns of small businesses in the above referenced matter since June 1999.

Background and Terms of the Proposed Rule

On March 25, 1999, the United States Postal Services (USPS) published a final rule on *Delivery of Mail to Commercial Mail Receiving Agencies* (CMRA) in the Federal Register, Vol. 64, No. 57, p. 14385. The rule required CMRA customers to use the abbreviation PMB in their addresses rather than other terms such as Suite, Unit, Apartment, etc. It also required: a) CMRA customers to provide an actual address to USPS on a PS Form 1583; b) CMRA owners to verify the and to match information on an application for a private mailbox (PMB) with information provided on the PS Form 1583; c) CMRA owners or managers and each addressee to complete and sign a PS Form 1583; and d) CMRA owners to submit a quarterly report to USPS with the names of new customers, current customers, and customers terminated within the last 12 months. At the time that the rule was finalized, USPS asserted that the rule was necessary to address mail fraud.

On March 13, 2000, USPS published a proposed rule on *Delivery of Mail to Commercial Mail Receiving Agencies* in the Federal Register, Vol. 65, No. 49, p. 13258. The purpose of the proposal is to revise the requirement that private mailbox users use the term 'PMB' in their addresses. The proposed rule amends the CMRA rule that was finalized in March 1999 by allowing CMRA users to use the # sign as an alternative to the PMB designator. The proposal also allows CMRA users to use three-line addresses.

USPS states that although small business groups have indicated that the PMB requirement may have a negative impact on the businesses of CMRA mailbox holders, USPS is not

convinced that negative perceptions will occur. Nevertheless, USPS asserts that it is proposing the revision in an attempt to balance the goal of protecting the public with the concerns of the small business community. Id.

The original deadline for complying with the PMB requirement was initially extended from April 26, 1999 to April 26, 2000. Pursuant to the most recent proposal, the deadline for compliance with the PMB or # sign requirement will be extended to August 26, 2000. Id.

The Office of Advocacy's Involvement in the Rulemaking

In May 1999, the Office of Advocacy began to receive a number of inquiries from small businesses about the CMRA rulemaking. In response to the inquiries, the Office of Advocacy held a roundtable discussion on June 11, 1999 with teleconference access for participants outside of the Washington, DC metropolitan area. Although the USPS was invited to the meeting, it did not send any representatives.

After speaking with the participants, Advocacy was concerned about the possible ramifications that the rule may have on small businesses and the general public. Advocacy enunciated its concerns in a letter to Postmaster William Henderson on June 25, 1999. (See Attachment #1) Specifically, Advocacy questioned whether USPS had considered the stigma that the PMB designator may have on small businesses, the possible loss of business due to mail being returned for not having the PMB designation, and the cost of changing supplies and business materials (e.g. catalogues, pamphlets) to include the PMB designator. Advocacy also questioned whether USPS had any data to support its allegations of fraud at CMRAs; whether USPS had considered less burdensome alternatives; and whether USPS was using its monopolistic power to eliminate competition.

Shortly thereafter, the Office of Advocacy began attending the meetings at USPS on this issue. At the meetings, Advocacy vehemently objected to PMB or any other designator on the basis that USPS had not provided any statistical or any other type of information to support the need for the rule or to indicate that the rule would have any impact on deterring fraud. Advocacy further pointed out that the rule discriminated against small business owners with limited resources; could possibly harm small businesses through negative public perception about PMB and the competency of a business that has a mail box as opposed to an actual office or storefront; could cause small businesses to lose business if mail was returned for failure to have a proper designator; and could be quite costly in terms replacing business stationary and materials. Moreover, Advocacy argued that the rule would in no way address the issue of mail fraud, which was the concern that USPS was allegedly attempting to address. These concerns were also enunciated in a letter to the Postmaster on October 20, 1999. (See Attachment 2)

The Proposal Lacks a Reasonable Basis

In its letter to USPS dated October 20, 1999, the Office of Advocacy asserted that USPS had failed to provide a reasonable basis for requiring CMRA users to use the PMB designator.¹ The basis of Advocacy's contention was that although USPS asserted that the purpose of the PMB requirement was to combat fraud, there was no data to indicate the amount of fraud occurring at CMRAs or that the PMB designator would in any way deter fraud. The Office of Advocacy adopts the arguments made in its previous submissions to USPS to this proposed rulemaking to revise the requirement to allow for the # sign to be used as an alternative designator.

Advocacy asserts that like the PMB designator, the # sign alternative is an unreasonable requirement. As Advocacy stated in the October 20th letter, a regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute. The Rockville Reminder, Inc. v. USPS, 480 F.2d 4, 6 (2nd Cir., 1973). Under a reasonableness standard, a court does not have to uphold an agency's action if it is merely plausible. The reasonableness standard allows courts wider latitude than the arbitrary and capricious standard by requiring that the link between the regulation and the legitimate purpose it is intended to advance demonstrate more than a minimum rationality. See Tovar v United States Postal Service, 3 F.3d 1271, 1276 (9th Cir., 1993).

Like the PMB designator, USPS has failed to demonstrate the link between the # sign requirement in the proposed regulation and the legitimate purpose it is intended to advance. Moreover, the rationale provided for the PMB designator or the # sign alternative is not plausible. There is no indication that the # sign requirement is necessary, that it solves the problem that USPS is attempting to address, or that USPS has considered fully the potential problems that this arbitrary requirement may impose upon small businesses. No studies, no data, no economic analysis--only USPS' bald assertion that either the PMB designator or the # sign is necessary to address the problem of fraud in CMRAs and that the # sign will mitigate the concerns of small businesses.

The # Sign Is Not Enough to Address the Concerns of Small Businesses

While USPS maintains that the # sign is meant to balance its goal of protecting the public with the concerns of the small business community, Advocacy asserts that it is merely a superficial solution. It does not address the problem of small businesses losing business due to potential customer confusion. Consumers may incorrectly assume, for instance, that a business that uses a CMRA provides inferior products or that it is not reputable. Nor does it address the financial burden of changing business materials, notifying old customers of the new address requirements to assure delivery of correspondence, or notifying potential customers who may use the address found on old materials. In fact, there is no analysis or information to support USPS' assertion that the # sign mitigates the concerns of small business. If anything, the Office of Advocacy and other small business advocates, such as the National Association of the Self Employed (NASE) and the National Federation of Independent Businesses (NFIB), stated at the meetings held by USPS that the # sign was not enough to address the concerns of small businesses. The Office of Advocacy asserts that

¹ See, pages 2-4 of Attachment #2.

given the fact that small business representatives do not believe that the # sign would address the small business concerns, the so-called “compromise” solution is merely an illusory attempt to make it appear as though the concerns of small business are being balanced with USPS’ goals.

The Address Designator Impedes Competition Among CMRAs

The Office of Advocacy further asserts that requiring the # sign or PMB designator impedes competition among CMRA owners. The # sign option may work if the CMRA is a franchisee of a larger company such as Mailboxes, Etc. (MBE), but it may not work for small CMRAs that are not affiliated with a major competitor. According to an MBE representative at the USPS meetings, MBE’s customers are contractually obligated to use the # sign in the address. Using a term such as suite, apartment, or unit in the address violates the contract.

Small independent CMRAs may not have the same contractual requirement for their CMRA customers. The flexibility of not having a particular type of address requirement provides them with a means to attract customers who want more address options. CMRAs without specific address requirements meet the needs of the customers whose needs cannot be addressed by operations such as MBE.

The lack of specific address requirements provides independent or small CMRAs with a means to compete. In essence, this simple distinction may, in fact, help to level the playing field. To require those CMRAs to impose the same contractual requirements as a large competitor such as MBE eliminates their ability to compete. There is something intrinsically wrong with a government agency that holds monopolistic control in a particular service area forcing the contractual requirements of one of the largest private competitors in the CMRA industry on the smaller competitors. Even if there is no collusive intent, there is an appearance of impropriety.

The # Sign Address Designation Violates 39 USC §403(c)

The Office of Advocacy further asserts, as it did with the PMB requirement², that the # sign alternative violates 39 USC § 403(c). It states that:

"In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user."

If USPS provides different services to different users, it must have a rational basis. Egger v. USPS, 436 F. Supp. 138 (W.D. Va., 1977).

As we stated in our October 20th letter, USPS does not have a rational basis for treating CMRAs any differently than other bulk mail facilities. The allegation that the PMB or #

² See, pages 3-4 of Attachment #2

sign requirement is necessary to combat fraud at CMRAs is not a rational basis because there is no indication that there are greater incidences of fraud at CMRAs than at other facilities. Even if all of the mail fraud occurred at CMRAs, USPS would be punishing approximately 99.9% of the boxes for offenses that occurred in approximately .1% of the boxes.³ To punish 99.9% of a given population for the actions of .1% of that population is irrational and fundamentally unfair.

USPS Could Have Benefited from an Economic Analysis Similar to the Type of Analysis Required by the RFA

As stated in the proposal, USPS is not subject to the Administrative Procedure Act (APA). 64 FR 14386 If USPS were subject to the APA, the proposal would be deemed unlawful because it is arbitrary and capricious, an abuse of discretion, or otherwise not in compliance with the law. See, 5 USC § 706 (2)(A). Under the arbitrary and capricious standard of review, an agency must demonstrate that it has considered relevant factors and alternatives after full ventilation of issues and that the choice made was a reasonable one. American Mining Congress v. Marshall, 671 F.2d 1251 (10 th Cir., 1982). Here, there is no indication that USPS has considered the most relevant factor -- whether the PMB regulation and the current proposal address the problems that they are suppose to address.

Moreover, if USPS were subject to the requirements of the APA, USPS would have to comply with the requirements of the Regulatory Flexibility Act⁴. The RFA requires agencies to consider the economic impact of regulations on small businesses and consider meaningful alternatives that may be less burdensome to small businesses. See, 5 U.S.C. §§601-612. Although the RFA does not prevent an agency from implementing a rule, it does require that agencies be informed of and sensitive to the impacts that a particular rule may have on small entities. Such an analysis may have provided USPS with guidance on whether the burdens of the proposal outweighed the alleged “benefits” of the address designator or whether the “compromise” solution truly mitigated the concerns of small businesses as asserted.

³ Id.

⁴ Congress enacted the RFA after determining that federal agencies were not considering the impact of regulations on small businesses. As a result, unnecessary and burdensome requirements were often imposed upon small businesses. The burdensome requirements discouraged innovation and adversely affected competition in the marketplace. See, Public Law 96-354, Sec. 2. The Office of Advocacy is required by §612(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id. On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. 104-121, which made a number of significant changes to the RFA, the most significant being provisions to allow judicial review of agencies' compliance with the RFA. 5 U.S.C. § 611.

Conclusion

Although USPS is an independent entity not subject to the requirements of the APA, it has public policy responsibilities in implementing its decisions. In this particular proposal, USPS has not met its duty to implement sound public policy. For nearly a year, the Office of Advocacy and other small business representatives have asked USPS to provide information that any sort of address designator for CMRA users was warranted; that the designator would in any way address the stated objective of the regulation; and that USPS has considered the economic burden and potential negative effects on small businesses. To date, USPS has presented nothing other than anecdotal evidence and unsupported assertions to support its contention that the address designator is necessary for combating fraud and that the small business concerns are not warranted.

To subject the public to a regulation without first determining if the regulation will address the underlying problem is contrary to the principles of sound public policy. USPS' failure to provide anything other than anecdotal evidence is harmful to the small businesses and the public as a whole. This regulation will not combat fraud. The bad actors will continue to defraud the public. It may cost criminals more money, but it will not stop them. Honest small businesses, however, may be subjected to a burdensome regulation unnecessarily. In terms of the public, the regulation will only provide a false sense of security. Advocacy suggests, once again, that instead of wasting valuable resources policing addresses at CMRAs, USPS should focus its efforts on investigative law enforcement efforts that would provide true security for the public without unduly burdening the small business community. The Office of Advocacy, therefore, respectfully requests that USPS withdraw the PMB requirement that was finalized on March 1999 and the proposed # sign revision that was published on March 13, 2000.

If you have any questions, please feel free to contact me at (202) 205-6533. Thank you for the opportunity to comment on this important proposal.

Sincerely,

Jere W. Glover
Chief Counsel
Office of Advocacy

Sincerely,

Jennifer A. Smith
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for Economic Regulation &
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